IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD D. PICKENS, Petitioner, vs. BEN CURRY, Warden Respondent.	No. C 05-2130 JF (PR) ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction for three counts of robbery. (Cal. Penal Code § 211). This Court found that the operative second amended petition stated cognizable claims and ordered Respondent[1] to show cause as to why the petition should not be granted. Respondent filed an answer addressing the merits of the petition, and Petitioner has filed a traverse. Thereafter, Petitioner filed a supplemental traverse with additional documentation and points and authorities. After reviewing the papers and the underlying record, the Court concludes that Petitioner is not entitled to relief based on the claims presented and will deny the petition.

[1]The proper named respondent in this action is Ben Curry, the acting Warden at the Correctional Training Facility in Soledad, where petitioner is incarcerated. Stanley v. Cal. Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994) (holding that the warden where petitioner is incarcerated is the proper respondent); Rule 2(a), 28 U.S.C. § 2254.

I. INTRODUCTION

An Alameda Superior Court jury convicted Petitioner of three counts of robbery in August 2001. On September 21, 2001, Petitioner was sentenced to a term of eighteen years in state prison. Petitioner appealed the judgment and conviction. On November 19, 2003, the appellate court affirmed the judgment. On February 18, 2004, the state supreme court denied a petition for review. Two state habeas petitions were denied by the state supreme court on June 8, 2005. The instant federal habeas action was filed on May 24, 2005; the second amended petition was filed on November 3, 2005.

A. Factual Background[2]

The relevant facts are set forth by the California Court of Appeal as follows:

> Appellant was tried for three robbery incidents involving four victims: Cassandra Angel (count one); Bruce Babst and Emily Grimm (counts two and three, respectively), and Dawn Roe (count four). Appellant was convicted only of the Babst, Grimm, and Roe robberies. As to the Angel robbery, the jury was unable to reach a verdict; nonetheless, we discuss the evidence regarding it, because it is relevant to appellant's contention that the various counts should have been tried separately.
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> **1. Angel Robbery (Count One)**
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> On October 2, 1999,[3] around 5:30 a.m., Cassandra Angel was alone at her workplace, the Hudson Bay Cafe, preparing to open for business. The cafe is located on College Avenue in Oakland, about three blocks from the Rockridge BART station. As she was setting up tables on the sidewalk outside the cafe, a man approached within three or four feet of her and said "Give me the money." The man was an African-American with a dark complexion and no facial hair, was a little over six feet tall, and looked about 23 to 25 years old. He was wearing a somewhat puffy blue down jacket with a hood that came almost down to his eyebrows, so Angel could not see whether he had any hair, and it was hard for her to tell how much he weighed, though she estimated about 175 to 180 pounds. The man kept his right hand in his coat pocket, and Angel was concerned that he might have a weapon, though he never said he had a gun or made any threats.
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> When Angel explained that the cafe's money had not arrived yet, the man asked for her personal money. She went to retrieve it, and he followed her inside the café. Angel gave the man the few dollars she had in her bag, and he left. The entire incident took about three or four minutes, and it was still dark out at the time. As soon as the man left, Angel closed the café and called the police to tell them she had been robbed.

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[2] The relevant facts are elicited from the unpublished opinion of the California Court of Appeal, First Appellate District, Division 2, People v. Pickens, Case No. A096385, (Nov. 19, 2003) at 1-10 (Respondent's Answer, Ex. C).

[3] All further references to dates are to the year 1999 unless otherwise specified.

On October 7, Angel was asked to view a lineup at the Oakland Police Department. She was shown about five or six men wearing a blue jacket that looked like the one worn by the man who robbed her, and she identified appellant as the perpetrator of the October 2 robbery.[4] Most of the people in the lineup had facial hair, but Angel recalled, and had told the officer who took her statement right after the robbery, that the robber did not have any facial hair.

At trial, Angel testified that she was "probably 99" percent sure that appellant was the man who robbed her, but not 100 percent. She also said that a blue jacket introduced in evidence by the prosecution looked like the one the robber had been wearing.[5]

2. Babst and Grimm Robberies (Counts Two and Three)

At dusk on October 2, the same day Angel was robbed, and also in the Rockridge district of Oakland, Emily Grimm and her boyfriend Bruce Babst returned to Grimm's home from grocery shopping, and parked Grimm's car on Ada Street near Broadway, in an area lit by a streetlight. Babst bent over into the interior of the car to retrieve the groceries from the floor, while Grimm stood in the street near the back corner of the driver's side of the car. Grimm saw a fairly thin, dark-complexioned, clean-shaven Black man, over six feet tall, with a long face and high cheekbones, crossing Ada Street towards her, wearing a bulky dark blue jacket with the hood pulled up over his head almost down to his eyebrows, so that his hair and forehead were not visible. The man's hands were out of sight under the jacket, making it bulge.[6]

The man walked directly towards Grimm and then stopped a couple of feet in front of her, leading her to think that he was going to ask her for directions or change, so she spoke to him. The man responded, "You can make it easy or you can make it hard. Give me your money, or I'll shoot you in the face." At that point, Grimm felt she was being threatened, and became concerned that the bulge in the man's jacket might be a weapon. Grimm handed the man her wallet, which contained only a few dollars in cash, but also had her credit cards, bank cards, and driver's license.

Babst, who had not been visible when the man approached, then emerged from the car and tried to determine what was happening. The man said "Give me your money" or "Give me the money"; Grimm told Babst to give the man his wallet; and Babst then understood that he and Grimm were being robbed. Before handing his wallet to the man, Babst asked if he could remove his driver's license. The man agreed, so Babst removed his driver's license and bank card from his wallet before handing it over. Grimm then asked if she could have her driver's license back as well, and the man handed it to her. The man immediately walked back in the direction from which he had come, and Grimm and Babst went to her home and called the police. The police took a fingerprint from Grimm's driver's license, but it did not match appellant's, and Grimm explained at trial that other people frequently handled her driver's license.

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[4]Angel also identified appellant at the preliminary hearing.

[5]The blue jacket used at the lineup, and introduced as evidence at trial, was taken from the car appellant was driving when he was arrested shortly after the Roe robbery.

[6]Babst also described the man as being over six feet tall, clean-shaven, having a long face and high cheekbones, weighing over 155 pounds but not heavy, wearing a blue jacket with the hood pulled up, and having his hands in his jacket pockets. Babst testified, however, that the jacket's hood came down only to the middle of the man's forehead.

A few days later, Grimm and Babst went to the police department to view a lineup. Appellant had a "peach fuzz" mustache at the time of the lineup, and Grimm had described the robber as clean-shaven. Nonetheless, Grimm identified appellant at the lineup as the man who had robbed her, as she also did at the preliminary hearing and at trial.[7] Grimm testified at trial that during the lineup, "it was just really obvious that that was him"; that she was "very positive that he was the person who robbed me"; that she had had a "visceral reaction" when he appeared and had "very strongly recognized" him; and that she had recognized his voice and the way he walked. Grimm also testified that the jacket used in the lineup, and introduced in evidence at trial, matched the jacket worn by the robber, which she remembered clearly because she had liked the material it was made from. On cross-examination, Grimm reiterated that she had "as much certainty as I can say about anything in my life" that appellant was the robber, though she declined to quantify her degree of certainty as being 100 percent, explaining "that's not a phrase that I would say."

Babst did not identify anyone as the robber at the lineup, but identified appellant both at the preliminary hearing and at trial. He testified at trial that he had recognized appellant as the robber at the lineup, and was certain of the identification once he heard appellant's voice; he explained that had not marked his lineup card because he was trying to avoid being subpoenaed as a witness later on, and admitted that he had "shirked my responsibility by not indicating anyone" from the lineup.[8] When asked on cross-examination whether his identification of appellant was 100 percent positive, Babst asked rhetorically "Is anything 100 percent[?]" but then added, "Yeah, I guess I can." Like Grimm, Babst identified the jacket introduced in evidence at trial as looking like the one worn by the robber.

3. Roe Robbery (Count Four)

About 7:00 a.m. on October 7, five days after the Angel and Grimm/Babst robberies, Dawn Roe was walking along the left side of McMillan Street toward Keith, heading for the bus stop at the Rockridge BART station, when a car passed her, going in the same direction she was walking. The car drew Roe's attention, because vehicle traffic was unusual at that time of the morning, and the car was moving abnormally slowly.

Shortly after the car turned right onto Keith Street, Roe noticed a man whom she did not recognize walking toward her on the opposite side of McMillan. The man was a thin African-American, over six feet tall, with a dark complexion, an oval face, and a shaved head, wearing a dark blue hooded jacket. Roe did not remember him as having any facial hair.

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[7]Grimm had given inconsistent estimates of the robber's age, but she explained at trial that this was due to her general tendency to be a bad judge of people's ages.

[8]At the preliminary hearing, Babst gave a somewhat different reason for not having marked his card at the lineup, i.e., that he did not "like to point the finger at people" and that "[i]t made [him] uncomfortable to identify someone." He was unequivocal, however, that appellant had been the only person at the lineup who resembled the robber. We do not perceive any irreconcilable inconsistency between Babst's varying explanations of his decision not to mark the lineup card, nor do we view his failure to disclose his recognition of appellant at the time of the lineup as fatally undermining the credibility or accuracy of his subsequent identification testimony.

Roe briefly made eye contact with the man, and he cut across the street towards her, pulling up the hood on his jacket. As Roe passed the man, she heard him say something to her that she did not understand. Eventually, she stopped, realizing that he was saying, "I don't want to hurt you. Give me your money." When Roe refused, the man gestured toward a nearby carport and said, "Get over there." The man was holding his hand in his jacket pocket in a way that made Roe concerned that he had a gun,[9] so she dropped the bags she was carrying and said, "No, I'll give you whatever you want." With the robber standing over Roe and telling her to hurry, she crouched down and retrieved just over $280 from one of her bags, consisting of one $100 bill, several $20 bills, and a few smaller bills.[10] The robber took the money and walked away in the direction from which he had come.

As Roe watched the robber walk away, she saw another person coming past the robber towards her, walking a dog. The dog walker was a man named Mark Sherstinsky. Sherstinsky testified at trial that just before he saw Roe that day, he had passed a tall Black man with a dark complexion and a shaved head, wearing a dark puffy jacket, walking in the opposite direction.[11]

Roe came running up to Sherstinsky, told him she had been robbed, asked him for help, and then ran around the corner of Keith and McMillan streets in pursuit of the robber, with Sherstinsky following behind. As she turned the corner, Roe saw the robber get into the driver's side of a car parked on Keith Street, with a license plate number beginning with either 1PT or IPT, and containing the number 100. It was the same car that had driven past Roe just prior to the robbery. Sherstinsky also saw the car pull away from the curb and speed off. He described it as a big brown "late 70s" American car, long and boxy in body style. After the car drove away, Sherstinsky accompanied Roe to a nearby grocery store, where she called the police and gave them the license plate number and a description of the robber and the car.

The car's description and the partial license plate number went out over the police radio, and shortly thereafter, around 8:00 a.m., an Oakland police officer spotted a brown Buick not far from the site of the robbery, and followed it for several blocks until he could read the license plate number. About when the officer got close enough to read the license plate number, which was 1PTS100, the car pulled over to the curb and stopped.

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[9]When Roe called the police later, she told them the robber had a gun. She explained at trial that she had not actually seen a gun, but had assumed the man had one based on the way he gestured with his hand in his pocket.

[10]Roe, who was a schoolteacher, was carrying an unusual amount of cash that day because she was planning to buy supplies for her classroom after work. At the preliminary hearing, Roe testified that the money she had been carrying had all been $20 bills, but she explained at trial that since the preliminary hearing, she had reviewed her contemporaneous notes indicating that the cash had included a $100 bill, and this refreshed her recollection.

[11]Sherstinsky only saw the man for a few seconds, and was unable to identify him when he looked at photographs of a subsequent lineup. At trial, he testified that appellant "resemble[d]" the man. Sherstinsky's trial testimony regarding the man's build was inconsistent with the statement he had given the police at the time.

The police subsequently arrested the driver (appellant) and passenger (Henry Lindsey).[12]

The police officers who were involved in appellant's arrest and the ensuing investigation found a dark blue, hooded jacket on the back seat of the car. At trial, Roe and Sherstinsky, like the other robbery victims, identified the blue jacket found in the car as the one worn by the robber. On the driver's seat of the car, the police found $208 in cash, consisting of one $100 bill, five $20 bills, one $5 bill, and three $1 bills, as well as a knife located next to the driver's seat.

When appellant's car was stopped, Roe was still at the grocery store, talking to the police who had responded to her call. They asked Roe to come and look at someone who might or might not be the person who robbed her, and drove her to the location where appellant's car had been pulled over. Once there, Roe identified appellant as the man who had robbed her, although he was dressed in different clothes. After Roe identified appellant, the police had him put on the blue jacket they had found in the car, and also showed Roe a second African-American man with a shaved head, who also put on the blue jacket. Roe was sure that appellant, not the other man, was the robber. She also recognized the car as the one in which the robber had left the scene, although she had paid more attention to getting its license plate number than to its physical appearance. Sherstinsky also testified that a photograph of this car looked like the car he saw pulling away after the robbery. Roe identified appellant as the robber with "100 percent certainty" at trial, and recognized his voice.

Later the same day, Oakland Police Sergeant Brian Medeiros, together with another officer, Sergeant Beal, interviewed appellant at the Oakland police station. Medeiros's trial testimony related the interview as follows.[13] Appellant told Medeiros that he lived with his mother, Audrey Cobb, on 46th Street in Oakland, and that he was employed as a caterer. Medeiros obtained a waiver of appellant's Miranda rights, and then asked him if he had been involved in the Roe robbery. Appellant repeatedly denied it, and explained that he had stayed with Denise Hines in Hayward the previous night and had left for Oakland between 6:30 and 7:00 a.m. Appellant acknowledged to Medeiros that he had some debts, but explained that he had inherited some $40,000 from his father, though his mother had control of it and he could not access it without her approval. He said that the blue jacket found in the back of the car had belonged to his deceased brother.

After interviewing appellant for about 40 minutes, Medeiros checked appellant's wallet for credit cards or identification belonging to the robbery victims, and found what he suspected (correctly, as later testing revealed) was three rocks of cocaine. Medeiros testified at trial that appellant responded by acknowledging that "I have a problem."[14]

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[12]The name is spelled phonetically as "Linzie" in some portions of the transcript, but in those instances, the prosecutor's questions identify "Linzie" as the person appellant was arrested with on October 7, 1999, so we understand those references to be to the same person, i.e., Henry Lindsey.

[13]As will appear, post, [Petitioner's] version of the conversation was markedly different from that of Medeiros; he denied answering any of the officers' questions or giving them any information.

[14]At a pretrial motion on December 18, 2000, Medeiros testified that upon the discovery of the cocaine, it was he or his colleague Sergeant Beal, rather than appellant, who "stated [that] you [appellant] have a problem."

Medeiros then left the interview room to mark the cocaine for later use as evidence.[15]

When Medeiros returned a little less than an hour later, appellant admitted that he had walked up to a White female earlier that day and asked her for her money, because he needed money for gas. Appellant also admitted having drug debts, using cocaine, and being responsible for three other robberies, one of which was committed in Oakland near the Safeway store, and one outside Oakland. Appellant then terminated the interview, and the investigating officers proceeded to arrange the lineup that Angel, Grimm, and Babst were asked to attend later that day.

4. Defense Case

Before testifying on his own behalf, appellant presented the testimony of his fiancée, Denise Hines; his mother, Audrey Cobb; and his former girlfriend, Latricia King, to corroborate his contention that he had no motive for the robberies because he had income from a catering business as well as access to a substantial sum of money his father had left him. King also provided conceitedly weak corroboration of appellant's alibi for the Roe robbery. The testimony of Hines and King is discussed in more detail below, in connection with appellant's contention that the trial judge erred in allowing the prosecutor to cross-examine them improperly.

Appellant testified that he had not committed any of the robberies. He explained that he had access to a substantial amount of money that his mother kept for him, some of which he had withdrawn from the bank around the time of the robberies, and therefore that he had no need to commit robbery in order to obtain funds. He discussed his work as a cook, and his efforts to start up a catering business. He asserted that he had been at King's home during the time the Roe robbery occurred; that the cash found on him at the time of his arrest came from his own bank account, and that he had obtained the $100 bill from the girlfriend of his co-arrestee, Henry Lindsey, who asked him to break it for her.

In response to the prosecutor's questions on cross-examination, appellant stated that he had stopped using crack cocaine some months before the robberies, and disclaimed ownership, and even knowledge, of the crack cocaine found in his wallet when he was arrested. He denied telling Sergeant Medeiros that he had a problem with crack cocaine. He contended that he had never seen the blue jacket until the morning of October 7, when it was placed on him after his arrest, and denied telling the investigating officers that it had belonged to his brother. He contended that after Sergeant Medeiros read him his Miranda rights, he declined to answer any of his or Sergeant Beal's questions. He denied saying any of the things attributed to him by Sergeants Medeiros and Beal, and said that he did not know where they obtained the information reflected in their notes.

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[15]Appellant was also criminally charged for cocaine possession, but those charges were severed and are not at issue on this appeal.

II. DISCUSSION

A. Standard of Review

This petition was filed after April 24, 1996, and, therefore, is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which imposes significant restrictions on the scope of federal habeas corpus proceedings. Under AEDPA, a federal court may not grant habeas relief with respect to a state court proceeding unless the state court's ruling was "contrary to, or an involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362, 413 (2000). "Under the 'unreasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. "[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411.

"[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was 'objectively unreasonable.'" Id. at 409. In examining whether the state court decision was objectively unreasonable, the inquiry may require analysis of the state court's method as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003). The "objectively unreasonable" standard does not equate to "clear error" because "[t]hese two standards . . . are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." Lockyer v. Andrade, 538 U.S. 63, 75 (2003).

A federal habeas court may grant the writ if it concludes that the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2). The court must presume correct any determination of a factual issue made by a state court unless the Petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A summary denial of a claim by the highest state court is considered a denial "on the merits," and is presumed to rest on grounds articulated by a lower court in its written opinion. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); Hunter v. Aispuro, 982 F.2d 344, 347-348 (9th Cir.1992), cert. denied, 510 U.S. 887 (1993). A reviewing court may then "look through" the unexplained summary denial, and apply the deferential standard of 28 U.S.C. 2254(d), to the lower state court's reasoned decision.

B. Analysis

1. The State Court's Rejection of Petitioner's Prosecutorial Misconduct Claim Was Not Objectively Unreasonable

Petitioner claims that the prosecutor committed misconduct by improperly eliciting Petitioner's opinion as to whether the testimony of several witnesses at trial was true. Petition at 6A. Specifically, the prosecutor asked Petitioner during cross-examination whether Petitioner believed a previous witness was lying, thus pointing out the inconsistencies between Petitioner's testimony and the testimony of the witness. Resp. Ex. C at 27-28. The prosecutor asked Petitioner whether Petitioner's fiancee lied when she testified that Petitioner had a key to her house. Id. The prosecutor also asked Petitioner whether the witnesses who identified Petitioner at the photo lineup were lying, and whether Officer Medeiros was lying when he testified to the events surrounding Petitioner's interrogation. Id. Defense counsel objected to the prosecutor's first question regarding the testimony of Petitioner's fiancee. However, during a conference in chambers, defense counsel "conceded that it was appropriate for the prosecutor to confront [Petitioner] with the inconsistencies between his testimony and that of other witnesses, but contended that it was misconduct for the prosecutor to ask [Petitioner] to speculate on the

veracity of other witnesses." Id. When the cross examination continued, "the prosecutor asked [Petitioner] whether the other witness had been lying or telling the truth..." but defense counsel's objection was overruled. Petitioner then answered that he did not know. Id. Petitioner responded to the prosecutor's similar questions in the same manner or by restating his former testimony. Id.

A claim of prosecutorial misconduct is cognizable on federal habeas corpus. The appropriate standard of review is the narrow one of due process and not the broad exercise of supervisory power. See Darden v. Wainwright, 477 U.S. 168, 181 (1986). A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." See id.; Smith v. Phillips, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Under Darden, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005). A prosecutorial misconduct claim is decided "'on the merits, examining the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir. 1995) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967), cert. denied, 516 U.S. 1017 (1995)). Therefore, the proper focus is not on the conduct of the prosecutor, but whether the trial was fair. Smith, 455 U.S. at 219.

Improper questioning of a witness by the prosecutor is not sufficient by itself to warrant reversal. In considering whether the questioning deprived the defendant of a fair trial, the witness's testimony should be viewed as a whole to determine the impact of the improper questioning. Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998) (prosecutor questioning witness as to whether she was afraid of defendant did not render the proceedings fundamentally unfair in light of witnesses' other testimony that defendant murdered her mother, stabbed her sister, stabbed her, and then tried to burn down their house while the victims were still inside). It is improper for a prosecutor to question a defendant regarding the veracity of government witnesses. United States v. Moreland, 509 F.3d 1201, 1212 (9th Cir. 2007); see, e.g.,

United States v. Sanchez, 176 F.3d 1214, 1220-21, 1222, 1223-24 (9th Cir. 1999) (misconduct where prosecutor elicited defendant's testimony that U.S. Marshal was a liar; witnesses' opinion that defendant was a liar; other people's hearsay statements; and inadmissible evidence of prior bad acts). It should be noted, Moreland and Sanchez both involved direct appeals of federal convictions and did not apply the highly deferential standard of review required by the AEDPA.

Respondent contends that the prosecutor's questions were not so unfair as to deprive Petitioner of his right to due process. Resp. Mem. at 10. Additionally, Respondent points out that the jury was presented with "overwhelming evidence of Petitioner's guilt." Id. This evidence included the fact that Petitioner was arrested in a vehicle that matched the description of the getaway car from the Roe robbery, that Petitioner possessed a puffy dark blue jacket similar to the one worn by the robber, and an amount of money almost equal to the amount taken from Roe, and that several of the robbery victims identified Petitioner at a photo lineup. Id.

The state appellate court held that "the trial court's reading of [the cited] cases only to preclude use of the word 'lying' was overly narrow." Resp. Ex. C at 29. The appellate court concluded that "the prosecutor was overzealous when she used the word 'lying.'" Id. However, the appellate court found that the trial court's admission of the prosecutor's questions was harmless. Id. The court noted Petitioner's concession that a prosecutor is allowed to point out inconsistencies between a defendant's testimony and a witness's testimony. Id. It observed that the prosecutor did not "put before the jury anything she would not have been entitled to point out during closing arguments." Id. Since the jury instructions provided that counsel's statements were not evidence and that the jury should assess the credibility of witnesses in light of conflicting testimony, the appellate court found it reasonable to conclude that the jury, not Petitioner, would determine who was telling the truth. Id. Ultimately, the appellate court concluded that although it did not condone the "prosecutor's cross-examination technique," the error did not require reversal. Id.

Applying the highly deferential standard of the AEDPA, this Court concludes that the prosecutor's questioning did not result in a violation of due process. While it may have been inappropriate to ask Petitioner about his opinion regarding the veracity of the testimony of the

testimony of some witnesses, the prosecutor's conduct did not render the trial fundamentally unfair. The jury was properly instructed that it should not consider counsel's statements as evidence. Moreover, Petitioner's response to the prosecutor's questioning was either to say that he did not know whether a witness was lying, or to restate his own testimony. The state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1),(2).

2. The Trial Court's Admission of the Impeachment of Defense Witnesses Was Not Erroneous

Next, Petitioner claims that the trial court erred in allowing the prosecution to impeach his defense witnesses, Denise Hines and Latricia King, by introducing testimony of Petitioner's past drug use and prior incident of domestic violence. Petition at 6A.

On direct examination by Petitioner's defense counsel, Ms. Hines testified that she had known Petitioner for seventeen years and that Petitioner was her fiancee and the father of her son. Resp. Ex. C at 10. She also testified that Petitioner occasionally stayed with her, and that she had helped Petitioner with his catering business around the time period when the robberies occurred. Id. Ms. Hines further testified that during the times she knew Petitioner, she had only seen him wearing a mustache and was never aware that he owned or wore a puffy blue hooded jacket such as the one worn by the robber. Id. at 10-11. Similarly, Ms. King testified on direct that she had helped Petitioner, her former boyfriend, start his catering business by selecting menu items and designing flyers. In an attempt to provide Petitioner with an alibi, she testified that Petitioner had come to her home early in the morning on the day of the robbery in question, and that he had spent a few hours there. Id. at 20.

On cross-examination, the prosecutor questioned Ms. Hines about her romantic relationship and financial dealings with Petitioner, to which Petitioner's defense counsel did not object. Resp. Ex. C at 11. However, when the prosecutor began questioning Ms. Hines about whether the "ups and downs" in her relationship with Petitioner were influenced by Petitioner's drug abuse, defense counsel objected that the testimony was irrelevant. Id.

At an ensuing conference in chambers, Petitioner's counsel further objected to questions going to Petitioner's prior substance abuse because such questions would violate the trial court's in limine ruling excluding evidence of Petitioner's drug conviction. Id. The trial court overruled the objection, holding that Petitioner's history of drug abuse was relevant for purposes of impeachment. Id. Subsequently, the trial court continued to allow the prosecution to cross-examine Ms. Hines about Petitioner's history of substance abuse. Id. at 12-15.

The prosecutor also cross-examined Ms. King at length about Petitioner's drug use and about various acts of domestic violence that Petitioner allegedly committed against her. Id. at 20-21. Ms. King acknowledged that one of the reasons she broke up with Petitioner was Petitioner's abuse of crack cocaine in 1997. Later in the course of cross-examination, the prosecution introduced evidence of a restraining order that Ms. King obtained against Petitioner in 1997. Id. at 21. Petitioner's counsel objected to this line of questioning, but the court allowed the evidence as relevant to whether Ms. King's testimony on direct examination, which was favorable to Petitioner, was motivated by fear. Id. at 21-22. Ms. King explicitly denied any fear of Petitioner and also stated that Petitioner had never physically abused her. Id. at 22. The prosecution then introduced evidence of a prior incident in which Petitioner held a gun to Ms. King's head, threatening to kill her if she did not give him money, and other incidents in which Petitioner pushed Ms. King into a wall, held a knife to her throat, and held a hot iron to her face. Id.

A state court's evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984); Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986). The admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guarantee of due process. See Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir.), cert. denied, 479 U.S. 839

(1986). In order to obtain habeas relief on the basis of an evidentiary error, a petitioner must show that the error was one of constitutional dimension and that it was not harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993). He would have to show that the error had "'a substantial and injurious effect on the verdict.'" Dillard v. Roe, 244 F.3d 758, 767 n.7 (9th Cir. 2001) (quoting Brecht, 507 U.S. at 623).

The appellate court rejected Petitioner's claim that the prosecution improperly cross-examined Denise Hines at trial for impeachment purposes:

> We accept (as did the trial court) appellant's characterization of Hines's direct testimony as not constituting evidence of general "good character." We therefore acknowledge that nothing in the direct entitled the prosecution to introduce general "bad character" evidence in response, whether through its cross-examination of Hines or otherwise. (Citation omitted). Nonetheless, we cannot find an abuse of discretion in the trial judge's ruling allowing the prosecutor's cross-examination to test Hines's knowledge of appellant's drug use during the course of her relationship with him, for two reasons.
>
> First, Hines's testimony that she had never known appellant to do certain things (specifically, own a certain type of jacket or shave off his mustache) entitled the prosecution to seek to impeach Hines by testing the depth of her knowledge of his behavior and habits during the 17 years she knew him. (Citation omitted). Second, the evident purpose of much of Hines's direct testimony was to bolster a key aspect of appellant's defense, to wit, his contention that because he had a growing catering business and an inheritance, he had no need to obtain money illegally, and thus no motive for the robberies.
>
> The prosecution's cross-examination regarding Hines's knowledge of appellant's drug use was aimed at impeaching Hines on both of these points, by "rebut[ting the] impressions left by [her] own testimony on direct," and thus was properly allowed. (Citation omitted). Moreover, in light of the fact that appellant had cocaine in his possession when he was arrested had already come into evidence, we find no abuse of discretion in the trial court's determination that the probative value of this evidence for impeachment outweighed its prejudicial effect. (Citation omitted).
>
> With respect to the recross-examination, our analysis must take into account the effect of appellant's trial counsel's having prompted Hines, on redirect, to testify that the last time she knew appellant to have used crack cocaine was in 1991. We concur with the trial judge's ruling that once appellant introduced this testimony, the state of the evidence changed in a way that materially affected the basis for the in limine rulings excluding evidence of appellant's drug arrests.
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> Appellant contends that the trial court's rulings rested on the theory that Hines's testimony had "opened the door" or "opened the gates" for the admission of otherwise inadmissible evidence, and that this was error. . . .
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> . . . .

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> In this case, however, it is clear from the record that when the parties and the trial judge used the term "opening the door" in reference to Hines's testimony, what they meant by it was not curative admissibility, but specific contradiction. Thus, our analysis focuses on that theory. Specific contradiction is a perfectly valid basis for impeachment. (Citations omitted). Indeed, as the commentators remark, "recognizing the entitlement to specific contradiction impeachment is essential to the proper functioning of an effective adversary system of litigation." (Citation omitted).
>
> Thus, we frame the issue differently. The question is whether the prosecutor's probing of Hines's knowledge of appellant's drug arrests between 1991 and the date of trial was properly allowed on a specific contradiction theory in order to impeach Hines's redirect testimony. (Citation omitted). The record makes clear that this line of questioning was aimed at eliciting evidence that would specifically contradict Hines's testimony that she was not aware of appellant's having used cocaine since 1991.
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> . . . .
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> In this case, on the other hand, Hines's redirect testimony was that to her personal knowledge, appellant had not used cocaine since 1991. The prosecutor was entitled to impeach the credibility of that assertion on recross by asking her about facts regarding appellant's drug arrests which, based on her account of her relationship with appellant, she could reasonably be assumed to know, and which specifically contradicted her testimony. (Citation omitted).
>
> In short, given Hines's testimony on redirect, the prosecutor was entitled to ask her, on recross, questions that were designed to impeach her on this specific point. Moreover, given Hines's prior testimony concerning her close association with appellant during the time between 1991 and the date of trial, she could be expected to have known when he was arrested during that time, and for what reason. Questions on this subject therefore constituted proper impeachment by specific contradiction of Hines's redirect testimony, even if evidence of appellant's prior drug arrests was inadmissible under Evidence Code section 1101. (Citations omitted).

Resp. Ex. C at 15-20.

The appellate court also rejected Petitioner's contention that the trial court erred in its rulings with respect to the cross-examination of Ms. King:

> [W]e concur with the trial court's decision to allow the prosecutor to question King about whether she and appellant had problems during their dating relationship, and if so, for what reasons. Given King's direct testimony that appellant was her *ex*-boyfriend, questions about the reasons for the termination of the relationship were clearly within the scope of direct. Appellant does not argue otherwise. These questions were also relevant, because of the obvious possibility that the answers would reveal a bias on the part of the witness. (Citation omitted). Moreover, by that point it was already in evidence that appellant had used cocaine during the late 1990s, had been in possession of it when he was arrested, and had experienced problems in another dating relationship (with Hines) because of it. Thus, we see no abuse of discretion in the trial court's having permitted the prosecutor to ask King whether her problems with appellant were related to his cocaine use. (Citations omitted).
>
> As for the domestic violence, the trial court's initial reason for allowing the prosecutor to question King about the subject was King's testimony that she had spoken

> with appellant by telephone on almost a daily basis during a period of time when there was a domestic violence restraining order in effect precluding personal or telephone contact between appellant and King. In our opinion, the trial court correctly ruled that the prosecutor was entitled to question King about the restraining order in order to impeach her statements regarding the frequency of her telephone conversations with appellant during this period. The existence of the restraining order, which was issued at King's request, tended to directly contradict her testimony, and was therefore properly introduced to impeach it.
>
> Thus, as underlined by the jury instruction appellant later requested and received (citation omitted), the evidence that King had taken out a domestic violence restraining order against appellant was not admitted to prove his bad character or disposition to commit the charged offenses, as precluded by Evidence Code section 1101, but rather to impeach King's testimony. Moreover as is clear from our narrative of the sequence of King's testimony, the prosecutor's lines of questioning about specific incidents of domestic violence were also relevant and admissible to impeach King's successive, volunteered statements about appellant: first, that she had not had a problem with him after the restraining order was issued, and second, that he had never abused her physically. The trial court correctly relied on a specific contradiction theory in allowing this testimony. (Footnote omitted).

Id. at 22-24.

The state appellate court distinguished the instant case from the cases Petitioner raised and concluded: "In short, none of the arguments and authorities on which appellant relies convinces us that the trial court erred in permitting the prosecutor to cross-examine King regarding the abuse she suffered at appellant's hands. Nor do we find that the prosecutor committed misconduct." Id. at 26.

This Court concludes that neither the trial court nor the state appellate court deprived Petitioner of his fundamental rights to a fair trial and to due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984); Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986). See also Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir.), cert. denied, 479 U.S. 839 (1986) (standing for the proposition that the admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or if the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process). The admission of evidence of Petitioner's drug use and acts of domestic violence for impeachment purposes was not an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented.

28 U.S.C. § 2254(d)(1), (2).

Moreover, even if the admission of the impeachment testimony was an error of constitutional magnitude, Petitioner has not demonstrated that the evidence introduced had a substantial or injurious effect on the verdict. Dillard, 244 F.3d at 767 n.7 (quoting Brecht, 507 U.S. at 623). Any error of admission of Petitioner's prior bad acts was harmless because, as Respondent points out, evidence of Petitioner's drug use also was offered by Sergeant Medeiros and by Petitioner himself. Resp. Ex B (Reporter's Transcript, "RT") at 1715-16, 2169; see Resp. Mem. at 14. Moreover, there was more than enough other evidence to permit an objective trier of fact to find Petitioner guilty of three counts of robbery beyond a reasonable doubt. As Respondent pointed out:

> Overwhelming evidence of petitioner's guilt was presented to the jury. One of the victims positively identified petitioner as the robber within hours of the robbery, and again positively identified petitioner at trial, as did the two other victims, one of whom also identified petitioner at a lineup several days after she had been robbed. RT 1166-67. Petitioner admitted to police he had robbed a "white woman" the day Dawn Roe was robbed, and was apprehended in the general area of the robbery, in a car which matched the description of the "getaway" vehicle. RT 1475, 1584-85, 1721-22. In the car was a dark blue jacket similar to the one worn by the robber, as was over $200, or just under the amount taken from Dawn Roe that day. RT 1476-77, 1590-91, 1632. Petitioner also admitted to three other robberies in the area where Bruce Babst and Emily Grimm were robbed. RT 1721-22. Resp. Mem. at 10.

Respondent also notes that the trial court instructed the jury on two occasions not to consider evidence of Petitioner's bad acts as character evidence, and defense counsel reiterated this point in closing argument. Resp. Mem. at 10; RT 2526, 2736-37, 2884-85; Ex. C at 26. For all of the reasons discussed above, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1),(2).

3. The Trial Court's Evidentiary Rulings Did Not Deny Petitioner The Opportunity to Present a Complete Defense

Petitioner's principal defense at trial was that the robberies with which he was charged were committed by someone else, and that the victims had misidentified him. Resp. Ex. C at 29. In support of his defense, Petitioner moved to admit three items of evidence: (1) evidence of

another robbery (the robbery of Kathy Morris) committed, by someone other than Petitioner, in the same area and during the same time period that Petitioner supposedly committed the charged robberies; (2) evidence of the fingerprint of Emily Grimm, which Petitioner argued could establish that a fingerprint taken from Ms. Grimm's driver's license immediately after the robbery belonged to the "real" robber; and (3) evidence that Petitioner had a personal relationship with a co-arrestee, Henry Lindsey, to show that the personal information that the police obtained about Petitioner, purportedly from an interview with Petitioner, also could have been obtained from Henry Lindsey, thus, bolstering Petitioner's claim that his alleged interview with the police was a fabrication. Resp. Ex. C. at 30. The trial court, exercising its discretion, excluded the evidence under California Evidence Code section 352.[16] Petitioner contends that this ruling was erroneous and deprived him of the opportunity to present a complete defense. Petition at 6A.

Respondent contends that evidence of the Kathy Morris robbery would have permitted the prosecutor to introduce evidence "of four uncharged robberies that also occurred in the same time period, the same general area, and in a similar manner as the instant offenses." Resp. Mem. at 16. This would "have been highly prejudicial to Petitioner's case by linking him to a total of nine robberies." Id. At a minimum, it would have required the victims of those robberies to testify, thus, causing undue delay and confusion. Id. Respondent asserts that the fingerprint on Ms. Grimm's license "was minimally probative." Id. Respondent claims that the print was kept out in order to "keep the trial on track and focused on the instant charge." Id. Third, Respondent argues excluding evidence that related to Henry Lindsey's statement to police "did not have a 'substantial and injurious effect' on the verdict." Id.

The Sixth Amendment affords an accused in a criminal trial the right to present a defense. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). The Due Process Clause "requires that criminal prosecutions 'comport with prevailing notions of fundamental fairness' and that 'criminal defendants be afforded a meaningful opportunity to present a complete defense.'"

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[16]Cal. Evidence Code § 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Clark v. Brown, 450 F.3d 898, 904 (9th Cir. 2006) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate the Sixth Amendment right to present a defense, as well as the due process right to a fair trial. DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing Chambers, 410 U.S. at 294, and Washington v. Texas, 388 U.S. 14, 18-19 (1967)); see, e.g., United States v. Sandoval-Mendoza, 472 F.3d 645, 655-56 (9th Cir. 2006) (direct review; where credible, qualified medical experts disagreed about whether the defendant's medical condition made him susceptible to suggestion, the trial court's exclusion of the expert witnesses' conflicting testimony deprived the defendant of his right to present an entrapment defense, warranting a new trial); United States v. Boulware, 384 F.3d 794, 808-09 (9th Cir. 2004) (direct review; exclusion of a state court judgment that directly supported defense to the tax charges and directly contradicted the government's theory of the case that defendant had stolen money from his closely-held corporation and gifted it to his girlfriend violated defendant's due process right to present a defense and error was not harmless beyond a reasonable doubt). However, while this right is well established, it does not preclude discretionary limitations on presentations of defense witnesses by the trial court where, for example, a witness has invoked the Fifth Amendment. See e.g., Arredondo v. Ortiz, 365 F.3d 778, 783-84 (9th Cir. 2004) (upholding trial court's exclusion of defense witness who intended to invoke the Fifth Amendment).

However, even if the trial court did err by excluding the evidence at issue here, Petitioner can obtain federal habeas relief only if the error violated his constitutional rights and had a "substantial and injurious effect on the verdict." Brecht, 507 U.S. at 619; Dillard, 244 F.3d 758 at 767 n.7. The state appellate court rejected Petitioner's claim as follows:

> Evidence of third-party culpability, like other evidence, is admissible unless its probative value is outweighed by the risk of undue delay, prejudice, or confusion, thus warranting its exclusion under Evidence Code section 352. (Citation omitted). In this case, the prosecution argued persuasively that if appellant was permitted to introduce evidence of the Morris robbery, then it should be permitted, in rebuttal, to admit evidence of additional similar robberies that occurred in the Rockridge area at about the same time, in which the victims' descriptions of the robber bore a strong resemblance to appellant. We concur with the trial court's exercise of its discretion under section 352 to exclude all of the evidence of other similar robberies, including that offered by appellant. Its

> probative value was minimal, and introducing it would have entailed significant delay, prejudice, and confusion.
>
> Similarly, the exculpatory effect of proving that the fingerprint on Grimm's driver's license belonged to a third party would also have been minimal. Appellant contends that obtaining and admitting this evidence would have allowed him to argue to the jury that the fingerprint belonged to the perpetrator of the robbery, who therefore must have been someone other than appellant. It had already been established, however, that the print did not belong to appellant, which had far more exculpatory weight than proving that it also did not belong to Grimm. Indeed, Grimm testified that other people frequently handled her license for totally innocent reasons. Thus, proving that the fingerprint belonged not to Grimm but to a third party would have added little if any weight to appellant's contention that some person other than himself was the robber. The trial court did not abuse its discretion in denying appellant's request. Taking a fingerprint from Grimm, and having an expert testify regarding its comparison with the print on the license, would have consumed far more time than was warranted by the potential probative value of such evidence.
>
> Finally, we find no reversible error in the exclusion of appellant's proffered testimony about his disclosure of personal information to Lindsey. We accept appellant's argument, which respondent does not seriously contest, that the testimony was not hearsay, the sole ground asserted and sustained for its exclusion. It was not offered to prove the truth of its contents, but only to establish a possible alternative source for information that the police contended was obtained from their post-arrest interview of appellant.
>
> The error was harmless, however. As the trial court pointed out, if appellant had testified as to what he told Lindsey, for the purpose of arguing that Lindsey passed it along to Medeiros, the prosecution would have been entitled to rebut this evidence by introducing the content of Lindsey's statement to the police. Given that appellant had successfully argued that Lindsey's statement should be excluded on hearsay grounds, we assume its contents were not helpful to appellant's case, and would not have corroborated his contention that the police had actually gotten their information about appellant from Lindsey rather than from appellant. Even setting aside this speculation, the fact remains that appellant's contention was extremely unpersuasive, given the extent and nature of the information that Medeiros testified he had learned from his interview of appellant. Thus, the probative value of the proffered defense evidence was so minimal that its exclusion has not been shown to have prejudiced appellant.

Resp. Ex. C at 30-31.

The state appellate court's analysis was not unreasonable. As the court held, the trial court did not abuse its discretion in concluding that the admission of the evidence would be of minimal probative value, entail significant delay in the trial, potentially prejudice Petitioner's defense, and confuse the jury. Accordingly, exclusion of this evidence was proper and within the trial court's discretion under California Evidence Code 352. Because as noted earlier, there was a wealth of evidence linking Petitioner to the three charged robberies, any error was harmless. Therefore, the state appellate court's determination was not contrary to, or an unreasonable

application of, federal law or Supreme Court precedent; nor did it result in a decision based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2245(d)(1), (2).

4. The Trial Court's Cumulative Evidentiary Rulings Did Not Render the Trial Fundamentally Unfair

Petitioner next claims that his trial was rendered fundamentally unfair by the cumulative effect of the rulings discussed above. Petition at 6A. Even if no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may prejudice a defendant so much that his conviction must be overturned. Alcala v. Woodford, 334 F.3d 862, 893-95 (9th Cir. 2003) (reversing conviction where multiple constitutional errors hindered defendant's efforts to challenge every important element of proof offered by prosecution). However, where no single constitutional error exists, nothing can accumulate to the level of a constitutional violation. Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996). Moreover, cumulative error is more likely to be found prejudicial when the government's case is weak. Walker v. Engle, 703 F.2d 959, 961-62, 968 (6th Cir.), cert. denied, 464 U.S. 951 (1983).

The state appellate court rejected Petitioner's claim of cumulative error as follows:

> "Appellant also argues that even if each of the asserted evidentiary errors was harmless in and of itself, their cumulative effect was to deny him a fair trial. We have rejected all but two of appellant's claims of evidentiary error, and have found the two that remain to have been harmless when considered separately. We likewise find them harmless even when considered cumulatively." Ex. C at 31, fn. 26.

This Court agrees with the state appellate court that the cumulative effect of the trial court's evidentiary rulings did not render Petitioner's trial fundamentally unfair. Because the two erroneous evidentiary rulings by the trial court were harmless, the cumulative effect of the trial court's evidentiary rulings could not amount to cumulative error. As has been noted previously, the evidence against Petitioner was strong. Accordingly, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1),(2).

5. The Trial Court's Denial of Petitioner's Severance Motion Was Not Error

Petitioner alleges that the trial court erred in denying his motion to sever the robbery counts from one another. Petition at 6A. A joinder, or denial of severance, of co-defendants or counts may prejudice a defendant sufficiently to render his trial fundamentally unfair in violation of due process. Grisby v. Blodgett, 130 F.3d 365, 370 (9th Cir. 1997); Herd v. Kincheloe, 800 F.2d 1526, 1529 (9th Cir. 1986). However, a federal court reviewing a state conviction under 28 U.S.C. § 2254 does not concern itself with state law governing severance or joinder in state trials. Grisby, 130 F.3d at 370. Nor is it concerned with the procedural rights to severance afforded in federal trials. Id. Its inquiry is limited to the petitioner's right to a fair trial under the United States Constitution. To prevail, a petitioner must demonstrate that the state court's joinder or denial of his severance motion resulted in prejudice great enough to render his trial fundamentally unfair. Id. In addition, the impermissible joinder must have had a substantial and injurious effect or influence in determining the jury's verdict. Sandoval v. Calderon, 241 F.3d 765, 772 (9th Cir. 2000).

The state appellate court rejected Petitioner's improper severance argument as follows:

> It is evident from the record that the trial judge in this case gave careful consideration to the issues raised by the motion, and was well-versed in the applicable law. For the reasons explained below, we conclude that the trial judge properly exercised his discretion in denying the motion.
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> . . .
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> [T]he trial judge in this case began his analysis of the severance motion by determining whether the evidence of the various robberies would be cross-admissible if they were tried separately, applying the tests discussed in *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*) for cross-admissibility under Evidence Code section 1101. The prosecution here contended that the evidence would be cross-admissible on either of two grounds: to show that each robbery was part of a common design or plan by appellant, or to show identity, i.e., to prove that appellant was in fact the person who committed each robbery.
>
> In *Ewoldt*, the Supreme Court explained that when evidence of other crimes is admitted to show a common design or plan, the purpose must be to show that the defendant's actions were consistent with those charged. "Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined . . . .' [Citation]. For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant was present at the scene of the alleged theft, evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to

demonstrate that he or she took the merchandise in the manner alleged by the prosecution." (Citation omitted).

Based on this analysis, the *Ewoldt* court noted that other crimes evidence will not be admissible to show common design "in most prosecutions for crimes such as burglary and robbery," because in such cases, "it is beyond dispute that the charged offense was committed by someone, [and] the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value." (Citation omitted). In light of this discussion, which is on all fours with the present case, the trial judge correctly rejected the prosecution's contention that the evidence would be cross-admissible to show a common design or plan, and held that it could only come in on the issue of identity.

On that issue, the trial judge duly noted the *Ewoldt* court's admonition that "[t]he greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (Citation omitted).

Even under this strict test, the trial judge found the robberies charged here sufficiently similar and distinctive to make them cross-admissible. He relied on the following factors: the robberies all occurred within a few blocks of one another during a five-day period (with two incidents on the same day); the perpetrator was over six feet tall, wore a distinctive blue hooded jacket, and kept at least one hand in his pocket in a way that made it look as if he had a gun; and in each case, the robber approached on foot a White female who was (or appeared to be) (footnote omitted) alone on the street, demanding only the victim's cash. Given all of these common factors, we concur in the trial judge's assessment that it is extremely improbable that these robberies could have been committed by different individuals. Thus, we can find no abuse of discretion in his conclusion that the crimes with which appellant was charged were sufficiently similar, and sufficiently distinctive, to meet the standard articulated in *Ewoldt* for cross-admissibility on the issue of identity.

Because the evidence would have been cross-admissible to prove identity, if the motion to sever had been granted, each of the juries would have heard the evidence of all three robbery incidents. Thus, even if we were to accept appellant's contention that the evidence of his culpability was materially stronger in the Roe robbery that in the other two incidents, we still would find no prejudice from trying the offenses together.

Our review of the severance issue could stop there. (Citation omitted) Nonetheless, we have also considered the alternative ground that the trial judge gave for his ruling, rejecting appellant's contention that the quantum of evidence in the three incidents was so different that a joint trial would result in a prejudicial "spillover effect." We agree.

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> Although there was a higher quantum of *circumstantial* evidence corroborating appellant's identification as the perpetrator of the Roe robbery, the *overall* strength of the evidence that appellant committed the Grimm/Babst robberies was very nearly equal, given Grimm and Babst's highly confident, mutually corroborating identifications of appellant as the man who robbed them. Thus, at least as to these three counts, appellant was not prejudiced by any "spillover" effect. (Citation omitted). Appellant argues that the evidence on the Angel robbery was significantly weaker, but this does not alter our conclusion, because the jury was unable to reach a verdict on that count. This fact in and of itself indicates that the jury properly carried out its duty to weigh the evidence on each count separately, and further negates any claim of prejudice from the denial of the motion to sever. (Citation omitted).

For the reasons set forth by the state appellate court, this Court concludes that the denial of Petitioner's severance motion did not result in prejudice "great enough to render Petitioner's trial fundamentally unfair." See Grisby, 130 F.3d at 370. The state appellate court reasonably applied California law on improper joinder and severance of criminal counts under the standard set out in Ewoldt. The evidence and circumstances surrounding the instant robberies were sufficiently similar to allow them to be cross-admissible to prove the identity of the perpetrator.

Moreover, even assuming that it was error to deny Petitioner's severance motion, Petitioner has not shown that the purported error had a substantial and injurious effect on the jury's verdict. Sandoval, 241 F.3d at 772. Accordingly, the state appellate court's determination was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based upon an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

6. The Trial Court's Denial of Petitioner's Motion for a Mistrial Did not Violate Petitioner's Due Process Right to a Fair Trial

Petitioner claims that his due process rights were violated by the trial court's denial of his motion for a mistrial. Petition at 6A. Petitioner moved for a mistrial during his case-in-chief based on the publication of a newspaper article earlier that day. The newspaper article allegedly contained information prejudicial to Petitioner. RT 2264-79; 2343; 2351-58. This included: (1) information that Petitioner was a registered sex offender with a criminal history; (2) that police believed Petitioner was responsible for several other robberies in North Oakland; and (3) that the

prosecutor had said that she believed Petitioner was responsible for a series of other robberies.[17] See id. The trial court questioned the jurors to determine if they had seen or read the newspaper article, and all denied having read or seen the article. RT 2356-57. The court reiterated the instruction it had given the jury repeatedly throughout the trial–that the jury was not to consider any such information in the context of the trial and denied Petitioner's motion for a mistrial. RT 2351-58.

As Respondent points out, the trial court made an explicit factual finding that none of the jurors in Petitioner's trial proceeding were exposed to the prejudicial information contained in the newspaper article. Resp. Mem. at 22; RT 2357. Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant [for habeas relief] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Petitioner has submitted copies of newspaper article(s) to the Court with his supplemental traverse. Pet's. Supplemental Traverse at 10-12, Ex. B. However, Petitioner has not shown that the submitted articles are the same as those that were the subject of his mistrial motion, nor has he produced any evidence showing that the jury in fact was exposed to them. Petitioner, therefore, has not rebutted the "presumption of correctness" to which the trial court's factual determinations are entitled.

The state superior court's denial of Petitioner's motion for a mistrial, based on the absence of evidence that the newspaper article(s) actually had a prejudicial effect on the jury, did not render Petitioner's trial "fundamentally unfair." Jammal, 926 F.2d at 919. Accordingly, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1),(2).

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[17]The prosecutor informed the trial court that the reporter who wrote the article had asked her about Petitioner's case. With the exception of providing the reporter with an estimated time line, the prosecutor did not answer the reporter's other questions. RT 2265-66.

7. The Alleged Destruction of Evidence Did Not Violate Petitioner's Right to Due Process

Petitioner claims that $208 in cash improperly was released to victim Emily Roe. Petition at 6B. Petitioner was arrested with $208 in cash shortly after the Roe robbery. Ex. C at 7. Roe was robbed of $208. Id. at 6. The bills in Roe's possession at the time of the robbery and the bills in Petitioner's possession at the time of his arrest were of the exact same denominations. Id. at 6-7. Petitioner contends that the money should have been tested for fingerprints, and that if none of Roe's fingerprints were found on the money it could not have belonged to her. Traverse at 23-25. This evidence would have "negated her identification of Petitioner as the robber." Id. Petitioner asserts that he made a timely request that the money be tested for fingerprints, but that it never was tested. Id. Petitioner also claims that a failure to make a timely request for testing of evidence has no bearing on the exculpatory value of the evidence. Id. Finally, Petitioner contends that Officer Medeiros acted in bad faith when he returned the money to Roe. Id. at 25.

The government has a duty to preserve material evidence, i.e., evidence whose exculpatory value was apparent before it was destroyed and that is of such a nature that the defendant cannot obtain comparable evidence by other reasonably available means. See California v. Trombetta, 467 U.S. 479, 489 (1984); Grisby v. Blodgett, 130 F.3d at 371. Although the good or bad faith of the police is irrelevant to the analysis when the police destroy materially exculpatory evidence, the analysis is different if the evidence is only potentially useful; in that case, there is no due process violation unless there is bad faith conduct by the police in failing to preserve evidence. Illinois v. Fisher, 540 U.S. 544, 547-48 (2004); Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Villafuerte v. Stewart, 111 F.3d 616, 625 (9th Cir. 1997); see, Fisher, 540 U.S. at 547-48 (no bad faith failure to preserve substance seized from defendant which had been tested four times and determined to be cocaine – the substance was only potentially useful evidence because defendant at most could hope that he could conduct another test that might show the substance not to be cocaine); United States v. Estrada, 453 F.3d 1208, 1212-13 (9th Cir. 2006) (no bad faith in part because there was no evidence of "malicious intent" by government); United States v. Martinez-Martinez, 369 F.3d 1076, 1087 (9th Cir. 2004)

(no bad faith failure to take blood or urine samples at time of defendant's arrest where it was not readily apparent that samples might have proven exculpatory for immigration crime).

Negligent failure to preserve potentially useful evidence is not enough to establish bad faith and does not constitute a violation of due process. Grisby, 130 F.3d at 371. The existence of a pending discovery request does not eliminate the necessity of showing bad faith on the part of police officers who destroy potentially useful evidence. Illinois v. Fisher, 540 U.S. at 547-48. Nor does the fact that the potentially useful evidence is central to the prosecution's case or the defendant's defense eliminate the necessity of showing bad faith. Id. at 549.

Respondent argues that Petitioner "must first show that the evidence [is] material" before its destruction can be determined to be a due process violation. Resp. Mem. at 22. In the alternative, Respondent maintains that a failure to preserve potentially exculpatory evidence amounts to a due process violation only if the failure was motivated by bad faith. Id. Respondent contends, however, that even if the money had been tested and Roe's fingerprints had not been found, that fact would not indicate that Roe had not handled the money. Respondent notes that Petitioner did not make any request to have the money tested "during the 'significant period of time'" that it was in police custody. Id. at 23. Finally, Respondent contends that the police did not act in bad faith by waiting nine months before turning it over to the rightful owner. Id.

This Court concludes that the return of the money to Roe did not result in any violation of Petitioner's right to due process. The money was not material to Petitioner's case, because the absence of Roe's fingerprints would not have been sufficient in and of itself to establish that the money did not belong to her, and thus it could not cast doubt on Roe's identification of Petitioner as the perpetrator. In addition, Petitioner failed to show that the police acted in bad faith when they waited nine months before returning the money to the victim. Petitioner's claim that he made a request for the money to be tested immediately upon his arrest is supported only by an affidavit attached to his traverse and does not appear in the trial record. Accordingly, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light

of the evidence presented. 28 U.S.C. § 2254(d)(1),(2).

8. Petitioner's Right to Due Process Was Not Violated By the State Court's Rejection of His *Brady* Claim.

Petitioner claims that the prosecutor committed Brady[18] error by failing to produce police reports regarding other similar robberies in the same area. Petition at 6B. Petitioner contends that because he was not identified by the victims as the perpetrator of those robberies, which were similar in many respects to the charged offenses, this evidence would have supported his "mistaken identity" defense, i.e., that a third-party committed the offenses with which he was charged. Traverse at 25-26. Petitioner maintains that the prosecutor suppressed materially exculpatory evidence, thereby violating his right to due process. Id.

In Brady v. Maryland, 373 U.S. at 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Supreme Court since has made clear that the duty to disclose such evidence applies even when there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. at 682.

"There are three components of a true Brady violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). The evidence need not be sufficient to prove affirmatively that the defendant is innocent; it need only be favorable and material. Gantt v. Roe, 389 F.3d 908, 912 (9th Cir. 2004). Moreover, good faith or inadvertence

[18] Brady v. Maryland, 373 U.S. 83 (1963).

does not excuse the prosecutor's duty; whether non-disclosure was negligent or by design, it is the responsibility of the prosecutor. Giglio v. United States, 405 U.S. 150, 154 (1972). That the defense failed to discover favorable evidence when it could or should have done so does not mean that such evidence has not been "suppressed." Gantt, 389 F.3d at 912-13. Impeachment evidence is exculpatory within the meaning of Brady. Giglio, 405 U.S. at 154; See also Bagley, 473 U.S. at 676.

However, a defendant cannot claim a Brady violation if he was "'aware of the essential facts enabling him to take advantage of any exculpatory evidence.'" United States v. Shaffer, 789 F.2d 682, 690 (9th Cir. 1986) (quoting United States v. Brown, 582 F.2d 197, 200 (2d Cir.), cert. denied, 439 U.S. 915 (1978)); see, e.g., United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995) (where government discloses all information necessary for defense to discover alleged Brady material on its own, government is not guilty of suppressing evidence); United States v. Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985). However, the availability of particular statements through the defendant himself does not negate the government's duty to disclose. United States v. Howell, 231 F.3d 615, 625 (9th Cir. 2000). "Defendants often mistrust their counsel, and even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences." Id. (citing United States v. McElroy, 697 F.2d 459, 465 (2d Cir. 1982)). "'Consequently, defense counsel is entitled to plan his trial strategy on the basis of full disclosure by the government, regardless of the defendant's knowledge or memory of the disclosed statements.'" Howell, 231 F.3d at 625 (quoting McElroy, 697 F.2d at 465).

Respondent argues that "there is no indication that the evidence at issue - police reports and statements by the victims of the other robberies - was exculpatory." Resp. Mem. at 23-24. Respondent points out that the state trial and appellate courts found that the probative value of this evidence was minimal because the perpetrator of the other robberies was never identified. Id. at 24; Ex. C at 29-31. Respondent also contends that there is no evidence that the prosecution suppressed this evidence, because "defense counsel indicated that the prosecution had fully complied with his request for discovery." Id. (citing to RT at 22-23). "Also, in connection with

the prosecution's motion to admit evidence... the court and counsel discussed the uncharged robberies, including the names of the victims involved. Thus, Petitioner was completely aware of the information he now claims the prosecution withheld, and [he] was presumably able to conduct his own investigation into its relevance to his case." Id. (citing to RT at 114-119). Finally, Respondent argues that there was no prejudice because the trial court found the evidence inadmissible under California Evidence Code section 352 because of its minimal probative value. Ex. C at 29-30. The state appellate court "concurr[ed] with the trial court's exercise of its discretion under section 352 to exclude all of the evidence of other similar robberies." Id. at 30. The appellate court reasoned that the probative value of the evidence was minimal, "and introducing it would have entailed significant delay, prejudice, and confusion." Id.

This Court concludes that the state court's rejection of Petitioner's Brady claim was not unreasonable. First, as the state trial and appellate courts concluded, the probative value of the evidence was minimal, and its introduction would have resulted in prejudice, undue delay, and confusion of the issues. If Petitioner had introduced evidence related to the Kathy Morris robbery, thus bolstering his third-party culpability defense, that would have resulted in the introduction by the prosecutor of evidence linking Petitioner with four other robberies, a circumstance that would have prejudiced Petitioner's case while being minimally probative of his alleged innocence. Second, the evidence concerning the other robberies was not suppressed, because Petitioner and his trial counsel knew about the other robberies, and defense counsel stipulated that the prosecution had complied with his discovery request. RT at 23. The trial court and defense counsel discussed the other robberies, including the names of the victims, on the record. Id. Accordingly, this Court concludes that the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1),(2).

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9. The Trial Court's Denial of Petitioner's *Miranda* Motion Did Not Result In Any Due Process Violation.

Petitioner claims that the state court's denial of his Miranda[19] motion was objectively unreasonable. Petition at 6B. Petitioner alleges that Officer Medeiros never read him his rights and that he never made a statement to Officer Medeiros; instead, he claims that Officer Medeiros fabricated Petitioner's statement during his testimony at trial. Id. Petitioner also claims that his due process rights were violated because his interrogation by the police was not electronically recorded. Id.

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that certain warnings must be given before a suspect's statement made during custodial interrogation can be admitted into evidence. Miranda announced a constitutional rule that cannot be superseded legislatively. Dickerson v. United States, 530 U.S. 428, 431-32 (2000). Miranda and its progeny govern the admissibility of statements made during custodial interrogation in both state and federal courts. Id. at 443-45. However, general "on-the-scene questioning" concerning the facts and circumstances surrounding a crime or other general questioning of citizens during the fact-finding process do not trigger Miranda warnings. Id. at 477-78. If a suspect indicates in any manner during questioning that he wishes to remain silent, interrogation must cease and any statement obtained thereafter is considered the product of compulsion. Id. at 473-74.

A person may waive his or her Miranda rights. Whether such a waiver is valid depends upon the totality of the circumstances, including the background, experience and conduct of the defendant. United States v. Bernard S., 795 F.2d 749, 751 (9th Cir. 1986). The government must prove waiver by a preponderance of the evidence. See Colorado v. Connelly, 479 U.S. 157, 168-69 (1986); Lego v. Twomey, 404 U.S. 477, 488-89 (1972); Terrovona v. Kincheloe, 912 F.2d 1176, 1180 (9th Cir. 1990).[20] The waiver need not be express as long as the totality of the

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[19] Miranda v. Arizona, 384 U.S. 436 (1966).

[20] To solicit a waiver of Miranda rights, a police officer need neither use a waiver form nor ask explicitly whether the defendant intends to waive his rights. See Terrovona, 912 F.2d at 1179.

circumstances indicate that the waiver was knowing and voluntary. North Carolina v. Butler, 441 U.S. 369, 374 (1979).

There is a presumption against waiver. United States v. Garibay, 143 F.3d 534, 536 (9th Cir. 1998). To satisfy its burden, the government must introduce sufficient evidence to establish that under the totality of the circumstances, the defendant was aware of "the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). A showing that the defendant knew his rights generally is sufficient to establish that he knowingly and intelligently waived them. See, e.g., Paulino v. Castro, 371 F.3d 1083, 1086-87 (9th Cir. 2004) (statement that suspect understood his rights and wanted to talk to officer sufficient to waive right to counsel).

Although the burden is on the government to prove voluntariness, a waiver cannot be held involuntary absent official compulsion or coercion. See Colorado v. Connelly, 479 U.S. 157, 170 (1986). There is no constitutional requirement that a police interrogation be electronically or stenographically recorded. United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977). Habeas relief should be granted where the admission of statements in violation of Miranda "'had a substantial and injurious effect or influence in determining the jury's verdict.'" Jackson v. Giurbino, 364 F.3d 1002, 1010 (9th Cir. 2004) (granting habeas relief where evidence was admitted against petitioner in patent violation of Miranda and he suffered "substantial prejudice" as a result) (quoting Calderon v. Coleman, 525 U.S. 141, 147 (1998)).

Officer Medeiros testified that he read Petitioner his Miranda rights, RT at 8-12, and that Petitioner thereafter "informed Sergeant Medeiros he wanted to talk with him." Id.; RT at 12. Petitioner then admitted his involvement in the four robberies. Id. at 14. However, "at some point during the interview... [P]etitioner invoked his right to remain silent." Resp. Mem. at 25. As a result, Officer Medeiros ended the interview and "noted on a standard form that an official statement was not taken." RT at 22. Respondent suggests "that Petitioner's [Miranda] claim is based on his refusal to give a written, or 'official' statement to police." Resp. Mem. at 25.

This Court concludes that the trial court's ruling did not violate Petitioner's right to due process. As noted above, there is no federal constitutional right to have a police interrogation

electronically recorded. Coades, 549 F.2d at 1305. In light of the highly deferential standard of review applicable to the instant proceedings, Petitioner has failed to rebut the underlying facts in the record that support the trial court's finding that Petitioner in fact was read his Miranda rights, and that he did make the statements at issue to Officer Medeiros. Accordingly, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1),(2).

10. Petitioner Was Not Prejudiced by the Admission of the Out-of-Court Identification

Finally, Petitioner states that denying him counsel at the police line-up violated his right to due process. Petition at 6B. A defendant has a right to counsel at a post-indictment lineup because it is a critical stage of the prosecution. See United States v. Wade, 388 U.S. 218, 236-37 (1967). Counsel is not required at pre-indictment lineups, however, because the right to counsel does not attach until adversary judicial proceedings have been initiated against a defendant. See Kirby v. Illinois, 406 U.S. 682, 688-91 (1972). At trial, Sergeant Medeiros testified that Petitioner was merely a suspect at the time of the lineup and had not been charged with any offenses. RT at 19. Thus, under Kirby, Petitioner was not entitled to counsel at the lineup because he had not yet been charged with a crime. Kirby, 406 U.S. at 688-91. Accordingly, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1),(2).

III. CONCLUSION

This Court concludes that Petitioner has failed to show any violation of his federal constitutional rights in the underlying state court proceedings. Accordingly, the petition for a writ of habeas corpus is DENIED. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: 4/21/08

JEREMY FOGEL
United States District Judge